Item VII

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State of California
Board of Behavioral Sciences

M e m o r a n d u m

To: Policy and Advocacy Committee **Date:** April 11, 2006

From: Paul Riches **Telephone:** (916) 574-7840
Executive Officer

Subject: Review of Complaint Disclosure and Public Disclosure Policies

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Background

On March 29, 2006 the Governor signed Executive Order S-03-06 which requires all state agencies to take a number of actions related to agency compliance with the California Public Records Act (Gov Code sec. 6250 et seq.). Among the required actions is for each agency to review (and revise as necessary) written guidelines for accessibility of records. This order appears to have been triggered by an audit of agency compliance with the California Public Records Act (Act) by Californians Aware (an advocacy group focused on access to government information). The audit found substantial non-compliance by many state agencies.

The board has two policies relating to the disclosure of public information that require review under the provisions of the Executive Order.

BBS Policy E-03-1 -- Complaint Disclosure Policy

This policy (adopted 2/21/2003) restricts the disclosure of complaint information to the form of an accusation prepared and filed by the Attorney General's office with three exceptions:

1. Upon the issuance of a citation.
2. Upon the filing of an Interim Suspension Order.
3. Upon the filing or appearance of the board at a hearing pursuant to Penal Code Section 23.

BBS Policy E-04-2 -- Public Disclosure Policy

This policy (adopted 11/19/2004) requires:

1. Disclosure of the status of a license
2. The date of issuance of a license
3. Expiration date of a license
4. Prior discipline against a license
5. Prior accusations against a license
6. Temporary restraining orders or interim suspension orders filed
7. Malpractice judgments in excess of $30,000
8. Citations issued within the prior five years

The policy also requires that license verification information (including discipline and citation information) be disclosed on the board's website.

Business and Professions Code Requirements

Business and Professions Code Section 27 requires the board (along with many other DCA boards and bureaus) to provide license status information on its website in accordance with the California Public Records Act. Status information includes prior enforcement actions.

B&P Section 800 et seq. requires the following:

1. That the board maintain a central file that contains conviction information, settlements and judgments over $3,000, public complaints, and disciplinary information.
2. That insurers report, to the board, settlements and arbitration awards in excess of $10,000 for malpractice.
3. That courts report, to the board, malpractice judgments in excess of $30,000

California Public Records Act

Generally requires the disclosure of any public document upon request by a member of the public. The act does establish specific exceptions to this general rule for a range of documents including investigative materials, examinations, communications with counsel, etc. Attached to this memorandum is a summary of the California Public Records Act prepared by the Attorney General.

Recommendations

Staff recommends that the board's public disclosure policy (E-04-02) be amended to be consistent with the requirements of the California Public Records Act and Business and Professions Code Section 27. The current policy of not disclosing citations issued after five years is inconsistent with the Act and should be eliminated. Citations are public documents and do not fall into any of the exceptions to full public disclosure in the Act.

Staff recommends that the board's public disclosure policy (E-04-02) be amended to be consistent with the requirements of Business and Professions Code Sections 800 et seq. The current policy only requires disclosure of malpractice judgments in excess of $30,000, but there are reporting requirements for reporting settlements and arbitration awards in excess of $10,000.

Attached is a proposed revision of E-04-03 that reflects the recommendations above.

Attachments:

Executive Order S-03-06
BBS Complaint Disclosure Policy E-03-1
BBS Public Disclosure Policy E-04-2
DCA Guidelines for Access to Public Records LGL 02-01
Californians Aware Audit Results
Business and Professions Code Section 800 et seq.
Business and Professions Code Section 27
Summary of the California Public Records Act 2004, California Attorney General's Office
Letter from Consumer Regarding Disclosure Policy

State of California Department of Consumer Affairs

BOARD OF BEHAVIORAL SCIENCES
1625 N. Market Blvd, Suite S-200, Sacramento, CA 95834
Telephone (916) 574-7830
TDD (916) 322-1700
Website Address: http://www.bbs.ca.gov

SUBJECT: Public Disclosure	POLICY # E-04-2	DATE ADOPTED: 11/19/04
	SUPERSEDES: E-95-1 SUPERSEDES: E-01-1 SUPERSEDES: E-04-1	PAGE: 1 OF 2
DISTRIBUTE TO: All Staff/Board Members	APPROVED BY:	**BOARD OF BEHAVIORAL SCIENCES**

Policy:

Upon request by a member of the public, the following information, if known, shall be disclosed:

1. Current status of a license, issuance and expiration date of a license, prior discipline, accusation filed, temporary restraining order or interim order of suspension issued or the resulting discipline.

2. Malpractice judgments of more than $30,000 reported to the Board on or after July 1, 1995.

3. Final determination of a citation for a violation of the law by the Board ~~within the last five years~~. This is not considered disciplinary action. Payment of the fine shall be represented as satisfactory resolution of the matter for purposes of public disclosure. (B&P Code Section 125.9(d)).

4. Malpractice settlements and arbitration awards in excess of $10,000 reported to the board.

A request by a member of the public includes access to the Board's Web site.

Implementation:

TO IMPLEMENT THE PUBLIC DISCLOSURE POLICY:

Effective immediately, the CAS (Consumer Affairs System) mainframe should be used for verifying the status of a license. This information is extracted nightly to the Board's Web site under its "Verify License" feature so that the public may access the information on the Board's Web site.

INFORMATION AVAILABLE BY MAIL AND TELEPHONE

License Status and/or formal action: Staff are to use the CAS 624 License Verification screen to verify the current status of a license.

1. Name
2. Address of Record
3. Issued Date
4. Expiration Date
5. License Number
6. Current status (status codes)
7. School attended and year of graduation.

Do NOT provide the DOB (date of birth), social security number or other information. Should the caller request more information, they will need to submit a request in writing and then we will obtain a release from the licensee. This procedure applies to telephone verification requests and does not apply when the Board is served with a subpoena.

If a Public Disclosure record is present on an individual's license a PF6 key will appear at the bottom of the 624 (License Verification) screen. Select the PF6 key and continue to hit enter until it brings you back to the 624 screen. This will paginate you through each public disclosure screen that is available for that license record. In addition, the Public Disclosure records are extracted from the CAS mainframe nightly and made available on the Board's Web site under the "license verification" feature so the public may access the information. The following disclaimers appear for each public disclosure category:

Administrative Disciplinary Actions Disclaimer:
"The information on Board disciplinary actions only goes as far back as 1980 following the final date of the action, such as the effective date of the discipline (e.g., revocation, probation, etc.) or the last day of probation. Our data does not include actions that were a result of action prior to this date."

* Note: If only status code 50 (Accusation filed) appears, also read the following:
"Although an Accusation has been filed, the subject has not had a hearing or been found guilty of any charges."

Malpractice Judgment Disclaimer:
"A malpractice judgment is an award for damages and does not necessarily reflect that the care provided by the licensee is substandard. All such reported judgments are reviewed by the Board and action taken only when and if it is determined that a violation of the licensing laws and/or regulations has occurred. Judgments are subject to a possible appeal." The information provided includes judgments reported on or after July 1, 1995.

Administrative Citations Issued:
A citation and/or fine has been issued for a violation of the law. This is not considered disciplinary action under California law but is an administrative action. Payment of the fine amount represents satisfactory resolution of the matter.

Implementation Date: Immediate

Attachment: None

Attachment A

Please click here to return to the previous page.

Executive Order

EXECUTIVE DEPARTMENT

STATE OF CALIFORNIA

EXECUTIVE ORDER EXECUTIVE ORDER S-03-06
by the
Governor of the State of California

WHEREAS, the access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state; and

WHEREAS, the California Public Records Act (Gov. Code sec. 6250 et seq.) provides that public records are open to inspection at all times during the office hours of the state or local agency; and

WHEREAS, the California Public Records Act requires that most state and local agencies shall establish written guidelines for accessibility of records which shall be posted in a conspicuous public place at the offices of these agencies and a copy of the guidelines shall be available upon request free of charge (Gov. Code sec. 6253.4); and

WHEREAS, at the November 2, 2004 General Election, the people of the State of California approved Proposition 59 to amend the Constitution to provide that statutes and rules furthering public access shall be broadly construed to further the people's right to access government information (Art. I, sec. 3 of the Constitution); and

WHEREAS, I, as Governor, have made a commitment that public information concerning the conduct of the state's business shall be disclosed to the people; and

WHEREAS, state agencies and departments under my authority shall take steps to ensure that they are complying with the language and intent of the California Public Records Act and Article I, Section 3 of the Constitution.

NOW, THEREFORE, I, ARNOLD SCHWARZENEGGER, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

Within 30 days of the date of this Executive Order, each agency, department, board, commission and office of the executive branch under my supervisory authority shall:

(1) Establish and/or review its written guidelines for accessibility of records; revise, as appropriate, its written guidelines for accessibility of records; and post the guidelines in a conspicuous public place at all office locations; and

(2) Identify and designate the members of its staff who shall be primarily responsible for receiving and responding to California Public Records Act requests and train those persons on the requirements of the Act; and

(3) Submit a written certification to the Legal Affairs Secretary that the designated staff members have been trained on the requirements and responsibilities of the California Public Records Act.

Agency secretaries and heads of independent departments and boards will be responsible for ensuring compliance with the provisions of this Order.

The Legal Affairs Secretary shall provide detailed instructions on the methods of timely compliance with this Order.

This Order is not intended to, and does not create any right or benefit, substantive or procedural, enforceable in law or equity, against the State of California, its departments, agencies or other entities, its officers or employees, or any other person.

I FURTHER DIRECT, that as soon as hereafter possible, this order shall be filed with the Office of the Secretary of State and that widespread publicity and notice be given to this order.

IN WITNESS WHEREOF I have here unto set my hand and caused the Great Seal of the State of California to be affixed this the twenty-ninth day of March 2006.

/s/ Arnold Schwarzenegger

Governor of California

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Attachment B

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State of California Department of Consumer Affairs

BOARD OF BEHAVIORAL SCIENCES
400 R STREET, SUITE 3150, SACRAMENTO, CA 95814
TELEPHONE: (916) 445-4933 TDD: (916) 322-1700
WEBSITE ADDRESS: http://www.bbs.ca.gov

SUBJECT: Complaint Disclosure Policy	POLICY # E-03-1	DATE ADOPTED: 02/21/03
	SUPERSEDES: E-01-2	PAGE: 1 OF 1
DISTRIBUTE TO: Enforcement Staff / Board Members	APPROVED BY:	**BOARD OF BEHAVIORAL SCIENCES**

Policy: Upon a request from the public, The Board of Behavioral Sciences (Board) releases complaint information in the form of an accusation once an accusation is prepared and filed by the Attorney General's Office, with certain exceptions. Following are exceptions to this policy, where complaint information is disclosed in lieu of or prior to the filing of an accusation.

1. A citation, fine, and/or order of abatement may be disclosed after the issuance of a citation. (Under Sections 125.9 and 148 of the Business and Professions Code and Section 1886 et. seq. Title 16 of the California Code of Regulations), the Board may issue citations, fines, and orders of abatement in lieu of filing of an accusation.

2. An interim suspension order (ISO) may be disclosed upon filing of the ISO. (Under Section 494 of the Business and Professions Code, an IS0 may be sought and issued in a case that is considered very recent, provable, shocking in nature, and posing an immediate threat.

3. An action taken by the Board pursuant to Penal Code Section 23 may be disclosed, upon the Board's appearance or filing. (Under Section 23 of the Penal Code, the Board may intervene in a criminal case to obtain a court order to suspend or restrict practice of marriage and family therapy, licensed educational psychology, or licensed clinical social work in advance of the filing of an accusation.)

Accusations and ISOs are allegations of wrongdoing for which there has not been a final determination. Decisions resulting from these actions are matters of public record and will be disclosed.

Implementation: Immediate

Attachment: None

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Attachment C

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State of California Department of Consumer Affairs

BOARD OF BEHAVIORAL SCIENCES
400 R Street, Suite 3150, Sacramento, CA 95814-6240
Telephone (916) 445-4933
TDD (916) 322-1700
Website Address: http://www.bbs.ca.gov

SUBJECT: Public Disclosure	POLICY # E-04-2	DATE ADOPTED: 11/19/04
	SUPERSEDES: E-95-1 SUPERSEDES: E-01-1 SUPERSEDES: E-04-1	PAGE: 1 OF 2
DISTRIBUTE TO: All Staff/Board Members	APPROVED BY:	**BOARD OF BEHAVIORAL SCIENCES**

Policy:

Upon request by a member of the public, the following information, if known, shall be disclosed:

1. Current status of a license, issuance and expiration date of a license, prior discipline, accusation filed, temporary restraining order or interim order of suspension issued or the resulting discipline.

2. Malpractice judgments of more than $30,000 reported to the Board on or after July 1, 1995.

3. Final determination of a citation for a violation of the law by the Board within the last five years. This is not considered disciplinary action. Payment of the fine shall be represented as satisfactory resolution of the matter for purposes of public disclosure. (B&P Code Section 125.9(d)).

A request by a member of the public includes access to the Board's Web site.

Implementation:

TO IMPLEMENT THE PUBLIC DISCLOSURE POLICY:

Effective immediately, the CAS (Consumer Affairs System) mainframe should be used for verifying the status of a license. This information is extracted nightly to the Board's Web site under its "Verify License" feature so that the public may access the information on the Board's Web site.

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License Status and/or formal action: Staff are to use the CAS 624 License Verification screen to verify the current status of a license.

1. Name
2. Address of Record
3. Issued Date
4. Expiration Date
5. License Number
6. Current status (status codes)
7. School attended and year of graduation.

Do NOT provide the DOB (date of birth), social security number or other information. Should the caller request more information, they will need to submit a request in writing and then we will obtain a release from the licensee. This procedure applies to telephone verification requests and does not apply when the Board is served with a subpoena.

If a Public Disclosure record is present on an individual's license a PF6 key will appear at the bottom of the 624 (License Verification) screen. Select the PF6 key and continue to hit enter until it brings you back to the 624 screen. This will paginate you through each public disclosure screen that is available for that license record. In addition, the Public Disclosure records are extracted from the CAS mainframe nightly and made available on the Board's Web site under the "license verification" feature so the public may access the information. The following disclaimers appear for each public disclosure category:

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"The information on Board disciplinary actions only goes as far back as 1980 following the final date of the action, such as the effective date of the discipline (e.g., revocation, probation, etc.) or the last day of probation. Our data does not include actions that were a result of action prior to this date."

* Note: If only status code 50 (Accusation filed) appears, also read the following:
"Although an Accusation has been filed, the subject has not had a hearing or been found guilty of any charges."

Malpractice Judgment Disclaimer:
"A malpractice judgment is an award for damages and does not necessarily reflect that the care provided by the licensee is substandard. All such reported judgments are reviewed by the Board and action taken only when and if it is determined that a violation of the licensing laws and/or regulations has occurred. Judgments are subject to a possible appeal." The information provided includes judgments reported on or after July 1, 1995.

Administrative Citations Issued:
A citation and/or fine has been issued for a violation of the law. This is not considered disciplinary action under California law but is an administrative action. Payment of the fine amount represents satisfactory resolution of the matter.

Implementation Date: Immediate

Attachment: None

Attachment D

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State of California Department of Consumer Affairs

Department of Consumer Affairs Policy & Procedures

SUBJECT: **ACCESS TO PUBLIC RECORDS**	*SUPERSEDES:* 91-08	*POLICY #* **LGL 02-01**
TITLE : **GUIDELINES FOR ACCESS TO PUBLIC RECORDS**	*EFFECTIVE:* IMMEDIATELY	*PAGE:* 1 of 4
DISTRIBUTE TO: **EXECUTIVE OFFICERS; BUREAU, DIVISION and PROGRAM CHIEFS**	*ORIGINAL SIGNED BY::*	
ISSUE DATE: May 1, 2002	**Kathleen Hamilton, Director** **Department of Consumer Affairs**	

Purpose

The purpose of this policy is to establish Guidelines for Access to Public Records.

Applicability

This policy applies to all agencies, divisions, offices, and programs within the Department of Consumer Affairs (DCA).

Policy

Every state agency is required under the Public Records Act (PRA) to establish written guidelines for the public to obtain access to public records. The attached guidelines comply with that requirement and the new requirements under AB 1014 (effective January 1, 2002) which require the agency to aid the member of the public in making a focused request by assisting in identifying the records and information that may be responsive to the request. Any denials of PRA requests for consumer complaints shall be subject to Legal Office review prior to responding to the requestor. A copy of the guidelines shall be posted in a conspicuous public place in your offices and shall be provided to any person, upon request, free of charge.

Authority

Government Code Section 6253.4.

Revision

Determination of the need for revision of this policy is the responsibility of the Legal Affairs Division of the DCA. Questions about the status or maintenance of this policy should be directed to the Policy, Research and Planning Division at (916) 322-3525. Questions about specific issues should be directed to the Legal Office at (916) 445-4216.

Department of Consumer Affairs
Public Records Act (PRA) Guidelines
(Government Code Section 6253.4)

The California Legislature has declared that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. The California Public Records Act, Government Code Section 6250 *et seq.,* requires that public records be available to the public upon request. The Department of Consumer Affairs has established the following guidelines to ensure that members of the public fully understand and are afforded the opportunity to exercise their right to inspect and obtain copies of public records.

Public records in the physical custody of the Department of Consumer Affairs or any of its constituent licensing agencies that are not exempt from disclosure will be made available for inspection or copying as follows:

1. Subject to reasonable notice, any person may review public records of the department or its constituent agencies (licensing boards) during weekdays and hours that these offices are regularly open for business. Public records will be available for inspection only at the office or location where they are regularly and routinely maintained.

2. Requests for inspection or copying of public records:

    a) should be placed in writing by the requestor;

    b) should be addressed to, or directed to, the specific bureau, program or constituent agency within the department (this includes the licensing boards) that the requestor believes has physical custody of the records being sought.

3. Unless the department and its constituent agencies make available an index of its records, they will provide the following to assist a member of the public to make a focused and effective request that reasonably describes an identifiable record or records to the extent it is reasonable under the circumstances:

    a) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.

    b) Describe the information technology and physical location in which the records exist.

    c) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

4. The requestor will be notified in ten (10) days whether the agency has disclosable public records. Where unusual circumstances exist as specified in Government Code Section 6253(c), the agency may, by written notice to the requester, extend the time for response not to exceed fourteen (14) additional days.

5. If a request is made for a record that is stored in an electronic format, the department and its constituent licensing agencies will comply to the extent required under Government Code Section 6253.9.

6. The department and its constituent agencies may refuse to disclose any records that are exempt from disclosure under the Public Records Act.

7. Any denials of PRA requests for consumer complaints shall be subject to Legal Office review prior to responding to the requestor.

8. Functions of the department or its constituent licensing agencies will not be suspended to permit, and public records will not be made available for, inspection during periods in which such records are reasonably required by department personnel in the performance of their duties. Special arrangements shall be made in advance for the inspection or copying of voluminous records.

9. Public records in the possession of the department and its constituent agencies may be inspected only in the presence of departmental personnel, except in those cases where the director or his or her designee (in the case of departmental records), or the executive officer or his or her designee (in the case of records in the custody of a licensing agency), determines otherwise. Physical inspection of such records will be permitted at places within the departmental offices or offices of the licensing agency as determined by the director or the executive officer, respectively.

10. The department and its constituent agencies will provide copies of any requested public records not exempt from disclosure upon payment of the following fees:

    - Requested public records will be produced at a charge of ten (10) cents per page plus the actual costs of the staff time for retrieving and duplicating the document(s). The cost of staff time will be computed in accordance with the guidelines contained in Section 8740 of the State Administrative Manual. However, these fees may be waived if the costs of retrieval and duplication are less than the cost of processing the payment.

    - Requests by an individual for copies of records pertaining to that individual (e.g., licensee files, personnel files, etc.) will be provided to that individual at a cost of ten (10) cents per page. In these cases, the cost of staff time for retrieving and duplicating the document(s) shall not be charged (Civil Code sec. 1798.33). However, these fees may be waived if the costs of duplication are less than the cost of processing the payment.

- Lists of licensees will be provided in electronic, paper, or mailing label form at a charge sufficient to recover the estimated costs of providing the data. Further information and a list of charges may be obtained by contacting the Office of Information Services at (916) 323-7018.

- As provided in Business and Professions Code sec. 163, a charge of $2.00 will be made to certify any document. This fee is in addition to copying costs.

11. A person who inspects records of the department or its licensing agencies shall not destroy, mutilate, deface, alter or remove any such record or records from the location designated for inspection, but shall physically return these in the same condition as when received, upon either the completion of the inspection or upon verbal request of departmental or agency personnel.

12. In the event that any portion of these guidelines may be deemed at any time to conflict with any law or regulation, the law or regulation shall prevail.

13. A copy of these guidelines shall be posted in a conspicuous public place in the offices of the department, and the offices of each of the constituent licensing agencies of the department. A copy of these guidelines shall be made available free of charge to any person requesting them.

14. Constituent licensing agencies of the department may, by written addendum to these guidelines approved by the executive officer or bureau, division or program chief, specify the procedures in which requests for public records shall be made to that agency (e.g., whether in writing or verbal), and the manner, if any, by which a record of such request shall be maintained by the agency.

APPROVED:

_____ _____

KATHLEEN HAMILTON, Director Date
Department of Consumer Affairs

Attachment E

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CALIFORNIANS AWARE

THE CENTER FOR PUBLIC FORUM RIGHTS

PUBLIC RECORDS ACT COMPLIANCE AUDIT OF CALIFORNIA STATE AGENCIES

Conducted January 2006

by

Ryan P. McKee

PUBLIC RECORDS ACT COMPLIANCE AUDIT OF CALIFORNIA STATE AGENCIES

Conducted January 2006

Introduction: The object of the California Public Records Act ("CPRA;" Government Code Section 6250 *et seq*.), originally enacted in 1968, is to ensure the people's right to know how their state and local governments are functioning. Fashioned after the federal Freedom of Information Act, the CPRA's intent is made clear in its very first section:

> "[T]he Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental right of every person in this state." Government Code Section 6250.

In addition, the voters amended California's Constitution in 2004 with the passage of Proposition 59, elevating the public's right to open government to a constitutionally protected right:

> "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." California Constitution, Article 1, Section 3(b)(1).

The CPRA defines a "public record" as any recording in any form of communication or representation, relating to the conduct of the public's business, that is prepared, owned, used or retained by any governmental agency in the State, regardless of its form or physical characteristics.

Any person, company, corporation, firm, partnership or association has the right to inspect public records during normal business hours or to receive a copy of a record by paying the cost of duplication, except when the record is exempted from disclosure by state or federal law.

Governmental agencies are not allowed to delay the inspection of public records and, in all circumstances, must respond to a public records request within 10 calendar days. However, for records known to be disclosable, such as those to be requested in this audit, the law says access is to be provided "promptly," and not needlessly delayed for some portion of 10 days. The CPRA emphasizes that nothing "shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." Government Code Section 6253(b)-(d).

Additionally, the courts have found that an agency may not require a public records request to be in writing. "The California Public Records Act plainly does not require a written request." *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381.

Purpose of this Compliance Audit: In recent years, corruption or abuse of office has been a frequent topic of news stories and criminal prosecutions in state and local government, from the offices of the Secretary of State and the Insurance Commissioner; to the Board of Supervisors in San Bernardino county; to the cities of Carson, South Gate, Compton, Vernon, Inglewood, Colton and San Diego. Unlawful secrecy has also led to civil suits against the Los Angeles County Board of Supervisors, the school districts of Orange, Bonita, and Chino Valley, the Pasadena Area Community College District; the cities of Claremont and Sierra Madre; water agencies like Three Valleys MWD and San Antonio Water Company; quasi-governmental non-profits like the Hollywood Business Improvement District and the Entertainment Industry Development Corporation – and even to a little-noticed network of police agencies formed for mutual assistance in combating drug crimes. Complaints of violations of the open meeting laws in particular have reached such a volume that special divisions in several District Attorneys' Offices have been created solely to investigate them.

As for compliance with the California Public Records Act – often a powerful tool for uncovering governmental or even private sector shortcomings ranging from the questionable to the criminal (see report, "Stories Reported Thanks to Public Records") – no public officer has been given authority to go to court to compel disclosure, as is the case with the open meeting laws. Two bills passed by the Legislature that would have given the Attorney General the authority to issue non-binding opinions on public agencies' failure to provide records access were vetoed by Governor Davis. A report several years ago by the legislative joint task force concluded that the California Public Records Act was, for several reasons, toothless for want of penalties for non-compliance or other credible enforcement mechanisms.

Compliance Audits Elsewhere: Over the last decade, in California and elsewhere, various organizations – usually but not always newspapers – have increasingly conducted public records law compliance "audits" of (usually local) government agencies. Most of those have done so by sending people to visit agencies in person and ask to inspect or to obtain copies of specified records that should be available to the public immediately with minimum delay, and with no argument. The agencies' responses are then compared in terms of promptness, copying costs, and no-questions-asked service. The results are then publicly reported. The effect is to give credit to the agencies who know their obligations to be open to the public and respond accordingly, and to give the rest a sense of where they need to improve. In California audits of this kind have been done in Los Angeles and Orange Counties, in Stockton, Vacaville, and most recently in Fresno, conducted by Californians Aware in the summer of 2005.

This Audit of California's *state* government agencies, a first of its kind, tested how they respond to very simple requests to view and for copies of obviously disclosable and readily available public documents.

Audit Item 1: Records Access Guidelines

The thirty-two (32) agencies selected for audit were chosen because Section 6253.4 of the CPRA expressly identifies each by name as being required to perform as follows:

> The following state agencies "shall establish written guidelines for accessibility of records. A copy of these **guidelines shall be posted in a conspicuous public place at the offices of these bodies**, and **a copy of the guidelines shall be available upon request free of charge** to any person requesting that body's records." Government Code Section 6253.4(a). (Emphasis added.)

The CPRA further states: "Public records are open to inspection at all times during the office hours of the state [agency;]" and, guidelines established for the accessibility of records "shall not operate to limit the hours public records are open to inspection." Government Code Sections 6253(a), 6253.4(b).

Audit Item 2: Form 700 Statements of Economic Interests

This open records requirement also aids the public's ability to insure that their public officials are free from conflicts-of-interest in their decision-making. The Political Reform Act (Government Code Sections 81000-91015) requires most state and local government officials to publicly disclose personal economic interests, and to refrain from decisions where a conflict lies. The Act generally prohibits state and local officials, employees, and candidates from accepting gifts of more than $320 annually from a single source, or more than $10 a month from a registered lobbyist.

The Fair Political Practices Commission ("FPPC"), responsible for enforcement of the Act's provisions, provides its Form 700 (Statement of Economic Interests) for use by public officials in their annual reporting. The Act makes all Form 700s available for public inspection during the agency's regular business hours and expressly prohibits the agency from placing any conditions on persons seeking access to the forms, or from requesting any information or identification from those persons:

> "Every report and statement filed pursuant to this title is a public record open for public inspection and reproduction during regular business hours ... **No conditions whatsoever shall be imposed** upon persons desiring to inspect or reproduce reports and statements filed under this title, **nor shall any information or identification be required of these persons**. Copies shall be provided at a charge not to exceed ten cents ($0.10) per page." Government Code Section 81008(a). (Emphasis added.)

Part 1 of this audit requested immediate access to view a Form 700 and to receive a copy of the agency's "guidelines for accessibility of records."

Audit Item 3: Employment Contracts

The CPRA makes every employment contract of a public official or employee open to inspection, without regard to the requester's reason for wanting that information:

> "**Every employment contract** between a state and local agency and any public official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255." Government Code Section 6254.8. (Emphasis added.)

The CPRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." Government Code Section 6257.5.

Audit Item 4: Litigation Settlements

The courts have concluded that litigation settlement agreements, entered into by California public agencies, are public records open to inspection: "[D]ocuments relating to settlement of a private personal injury claim with public funds constitute 'writings' containing information regarding 'the conduct of the public business,' subject to public inspection and disclosure under the CPRA." *Register Division of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal.App.3d 893, 901 (4th Dist., 1984). "We conclude that assurances of confidentiality by the County regarding the settlement agreement are inadequate to transform what was a public record into a private one." *Id.* at 909.

Part 2 of this audit requested copies of an employment contract or similar document(s) reflecting the total compensation of the state agency's top-ranking employee, and a recent litigation settlement agreement.

Testing Methods: The records requester ("Auditor"), Ryan P. McKee, an 18-year old college student, personally visited the main office of each of the 32 State agencies, as identified by the California Secretary of State's Roster of Constitutional Officers, State Agencies, Departments, Boards, and Commissions, and asked to see the employee responsible for handling public record requests.

Once directed to that individual, the Auditor provided the Part 1 - 3x5" card shown here - - - - - - - - - - - - - >

He also asked to be directed to where the agency's "guidelines for accessibility of records" are posted. He recorded the time entering and leaving the office, any response to his requests, and any information that was requested from him.

When Part 1 was complete, he left his Part 2 – 8½ x 5½" signed, written request for copies of public records, shown here - - - - >

He then recorded when the agency notified him the documents were ready to be picked up, or when postmarked if he received the records by mail.

Public Records Request:

(a) to view the most recent FPPC Form 700 (Statement of Economic Interests) for this public agency's top-ranking employee;

(b) for a copy of this public agency's written guidelines for accessibility of public records.

Dear Public Records Administrator:

I request true and correct copies of the following public records:

1. the Employment Contract and/or similar document(s) that reflect the total annual compensation of this state agency's top-ranking employee; and
2. the most recent litigation settlement agreement, involving this state agency, which includes a payment of $100,000 or more to the plaintiff(s).

Please call me (909-239-8493) when these documents are ready for my pick up. I assure this agency that I will pay the costs of duplication when I pick up these copies. In the alternative, the agency can mail the copies to the address below, and I will immediately reimburse the costs of duplication and mailing.

Respectfully,

Ryan McKee P.O. Box 8466, La Verne, CA 91750 (909)239-8493

All the information accumulated was then transferred to a computer file and the results tabulated.

All initial contacts in this 32-agency audit were performed over three days: January 17, 19, & 20, 2006. One agency was eliminated (Department of Youth Authority), because it had been merged with the Department of Corrections.

Agencies that refused to accept the requests for records during the first visit to their main office were sent follow-up written requests, mailed on January 24, 2006.

Data was accumulated and recorded for each agency during the 30-day period following the initial in-person visits to the main offices of all of the agencies. The audit concluded on February 19, 2006.

Results/Responses: Given news reports of several public records audits of *local* agencies, such as the latest done last fall by Californians Aware, one might expect an audit of these 31 *state* agencies to produce similar results, with 50 to 75% failing to properly respond to simple public records requests.

In this auditor's experience, having performed, just 14 months earlier, a similar audit of 52 *local* agencies within eastern Los Angeles and western San Bernardino counties, only 11 (21%) performed precisely as the law required.

Yet quite surprisingly, the present audit of 31 *state* agencies (all identified by name within the CPRA) found *none* complied exactly as the law requires, and many ignored almost entirely their duties as mandated by the CPRA and the Political Reform Act.

GRADES FOR STATE AGENCY PERFORMANCE

Before attempting to evaluate the quality of the responses of these state agencies to the requests for public records, the Auditor created a 100-point grading scale based upon point deductions for each failure to conform as commanded by the CPRA and Political Reform Act, and also for exceeding reasonable times for producing the records requested.

In a previous audit of 52 *local* agencies, where the verbal request was to view an FPPC Form 700 and the employment contract of the CEO, this auditor found that 48% produced both documents within 20 minutes (33% within only 12 minutes).

Since Part 1 of this present Audit requested to view records even less demanding (a FPPC Form 700 and the agency's written Guidelines for records access), this Auditor concluded that any time over 1 hour necessary to provide these documents was an excessive delay, and deserved a deduction in the score.

Additionally, each failure to provide one of the four documents requested was given a 20-point deduction, with *each* unlawful request for information made to the Auditor (his identity, affiliation, or a reason for seeking the records), prior to being allowed to view the documents requested in Part 1, was given a 5-point deduction, up to a maximum of 10 points.

Finally, points were deducted for an agency's failure to respond to the Part 2 written request within the CPRA's 10-day limit. And no credit was given for any document provided by an agency after 20 days.

Expectations of this Records Audit:

1) **Guidelines for Records Access - - - - - - - - - - - posted for public in agency's main office**
2) **FPPC Form 700 provided for viewing & Guidelines for Records Access provided free - within 1 hour (without requesting any additional information from Auditor)**
3) **Salary Document & Settlement provided – - - within 10 days**

Grading Scale	Point Deductions (100 points possible)		
100 = A+	Guidelines Not Posted in Agency Office	=	-10 points
95 = A	Each free Copy of Guidelines & Form 700 to view		
90 = A-	provided within: 1 hour of request	=	-0
85 = B+	1 hour to 1 day of request	=	-5
80 = B	2 – 5 days of request	=	-10
75 = B-	6 – 10 days of request	=	-15
70 = C+	> 10 days or not at all	=	-20
65 = C	Information Requested of Auditor - -		
60 = C-	Assessed at -5 for each request for:		
55 = D+	Identity, Affiliation, or		
50 = D	Why Records Being Sought	=	-10 (maximum)
45 = D-	- - - - - - - - - - - -		
40 = F+	Each Salary Document or Settlement Agreement		
35 = F	Provided - within 10 days	=	-0
0-30 = F-	within 11-20 days	=	-10

> **20 days or not at all = -20**

Notable Findings

Part 1 Results -- Request made in person to view a Form 700 and receive a copy of the Guidelines:

(a) The most striking discovery was that 90% of the state agencies failed to post, in their main office, a copy of the Guidelines for Accessibility of Public Records (Government Code Section 6253.4(a)). Two-thirds could not provide a copy of those Guidelines when requested by the Auditor during his visit to the agency's main office. Even 10 days after the visit to agency offices, more than half still had failed to provide the Guidelines; and some that did comply, illegally charged the Auditor a fee for the copy of the Guidelines.

(b) When asked to present the FPPC Form 700 for the agency's top-ranking employee, 74% of the agencies could not produce the Form within one hour. Less than one-third could produce it in one day, and barely half produced the Form within 10 days. (In contrast, the Auditor's previous audit of 52 local agencies found almost half could produce the Form 700 in 20 minutes, 69% produced it within one day, and 88% provided it within 10 days.)

(c) Employees at 71% of the state agencies wanted to know some information from the Auditor (his name, who he was working for, or why he wanted to view the record) before allowing him to see the Form 700. (This result proved similar to the 52-local agency audit, where 65% asked for some information from the Auditor.)

Part 2 Results - - Request in writing for copies of a Settlement Agreement and a Salary Document:

(a) When requested to provide a copy of the document showing the total annual compensation of that state agency's top-ranking employee, only 29% could supply that record within 10 days. And after 20 days, only 55% had complied with this written request. (Yet, in the 52-local agency audit, 88% had complied within 10 days, and 96% had furnished the record within 20 days.)

(b) Similarly, only 29% could supply a copy of that agency's most recent Litigation Settlement Agreement, where more than $100,000 was paid to plaintiff(s), within 10 days. And just barely half (52%) could provide this document within 20 days. (No comparison can be made with the local agency audit, as this document was not requested there.)

The Best:

Grade: A Of all the State agencies surveyed, **Cal STRS** proved the best. Filing Officer James Musante and Staff Counsel Robert Van Der Volgen gave immediate attention to the requests, providing Guidelines and Form 700 within 46 minutes and the Compensation Document and Settlement Agreement in less than one day. The only thing that kept STRS from a perfect score was the receptionist who, after being shown a card identifying the Part 1 records requested, asked to know who the Auditor worked for before calling Mr. Musante to assist in providing the records.

Grade: A- Two other agencies were very close behind, only failing to have the Guidelines posted in their office. Human Resource Analyst Melanie Wong and Supervising Staff Counsel Christopher Pederson of the **California Coastal Commission** cooperated in providing the Part 1 documents in only 20 minutes and the Part 2 records within 8 days of the written request. And at the **Department of Toxic Substances Control**, Associate Government Program Analyst Mark Abrams and Senior Staff Counsel Joan Markoff cooperated to produce the Part 1 documents in 24 minutes and the Part 2 records within 6 days.

No other agency received better than a grade of C+.

The Worst:

Grade: F- Several agencies performed miserably:

By far, the very worst experience for this Auditor was provided, ironically, by the **Department of Consumer Affairs**. First, a female employee in the Consumer Information Center of the Consumer and Relations Division grilled the Auditor for more than 20 minutes demanding to know who he was, why he wanted the records, and what agency he worked for (a demand repeated three times). Twice asked to identify herself, she refused, saying she would not reveal her name because the Auditor refused to identify the agency he was working for. A male employee, also refusing to identify himself, provided the Auditor with a "Procedure to Subpoena Records" form and said to call the phone number on that form. Both employees refused to accept either of the Auditor's requests for records and refused to date-stamp them for him. The Auditor then mailed both requests to the department, and over the next 24 days received no response of any kind.

Three agencies, the **Department of Motor Vehicles**, the **Department of Social Services**, and the **Department of Justice** (the office responsible for counseling and representing many if not most state agencies on the Public Records Act), would not even let the Auditor enter the building that is their main office; each saying that without a previously made appointment with someone in that office, the public was not allowed to enter. The Auditor then made both the requests by mail. Only Social Services responded (11 days after receiving the mailed requests). However, the more than $300,000 Settlement provided was filled with redactions, eliminating the Case Number and Plaintiffs' names in probable violation of the law. But, in the case of the other two departments, 24 days after the receipt of those mailed requests, neither had responded in any manner.

At the **Employment Development Department** security escorted the Auditor to the Legal Office, which provided nothing but accepted both requests. Eleven days later the Assistant Chief Counsel David Paulson replied by mail with a generic letter, saying EDD requires an additional 14 days to respond because the request *may* require search, collection, examination of records at separate offices. However, 20 days after his letter, still no records had been supplied.

At the **Department of Health Services**, Filing Officer Karen Moreno said it would take too long to retrieve the Form 700; she would mail it. Reluctantly, she accepted both requests saying they really

weren't acceptable and should be a full-page letter to the legal division. In a response 13 days later, the Form 700 was the only document she provided. After 30 days, no other response was received.

Despite returning a second day to the **Department of Mental Health**, at the urging of Department staff, Gail Schurr, Secretary to Public Records Coordinator Steve Appel, said he still wasn't in and no one could respond to the Auditor's requests. The Auditor left both requests with main office (Room 151) staff, assured they would be forwarded to Mr. Appel. Seventeen days later Mr. Appel called to ask what the Auditor was going to do with the information. During the phone conversation, Mr. Appel gave his assurance that the records would be mailed within the following 2 days. Yet still, 31 days after the Auditor's first appearance at the DMH office to make his requests, Mr. Appel had provided *absolutely nothing* in response. (Mr. Appel is the same records coordinator who asserted earlier this year that the Atascadero State Hospital's "funny papers" – its informal term for special incident reports compiled by hospital employees witnessing assaults against staff and patients at the mental facility – could not be reproduced or quoted directly from by the San Luis Obispo County *Tribune*, contending that the State owns the copyright on the "creative sparks" within those reports.)

After **CalPERS** Receptionist Marty Gelarei refused to accept the records requests, saying the Auditor could not make public records requests at that office and was *required* to submit them on the Internet, the Auditor then made the requests by mail. However, 24 days after CalPERS received the mailed requests, the Auditor had received absolutely no response.

Last, but certainly not the least among the transparency scofflaws, is the **California Public Utilities Commission**. Once in the door, the Auditor was directed to Central Filing on the 2nd floor, where Juan Bautista, *refusing* to look at the card describing the records being requested, *required* the Auditor to fill out the form, "Public Request for Central Files Services," asking the Auditor's name, address, phone number and affiliation. Once Mr. Bautista saw what documents were being requested, he directed the Auditor to Human Resources on the 3rd floor, which in turn directed the Auditor to the 5th floor, where Executive Assistant Karen Amato in the Executive Division provided nothing, but did accept both requests for records. It was 9 days later when Suzy Hong, Legal Division, provided the Form 700 and the Guidelines. But it was 24 days after the initial requests that Ms. Hong finally responded to the requests for the compensation and settlement documents, saying these records amounted to 100 pages and would be forwarded *only* after her receipt of $52.00, which included a copying charge of 20¢ per page, plus $32.00 for retrieval/review/clerical, 2 hrs. @ $16.00/hr. The Auditor notes that the PUC's own "Procedures for Obtaining Information and Records" (General Order No. 66-C) makes no mention of such a charge for retrieval/review/clerical services, only a charge for duplication. Moreover, a charge for such has been recognized as unlawful since 1994, when the Fourth District Court of Appeal, interpreting Government Code Section 6253's authorization to charge a copying fee "covering direct costs of duplication," ruled in *North County Parents v. Dept. of Education*, 23 Cal.App.4th 144, "The direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it. **'Direct cost' does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling** of the file from which the copy is extracted." *Id.* at 148. (Emphasis added.)

Educational Follow-up To help these government agencies understand their responsibilities and to aid them in making whatever adjustments may be necessary, each will receive a copy of this Audit overview and conclusions, the three-page summary of the audit's results and grades, along with a page showing how that particular agency performed.

In the near future, the Auditor will ask each agency what steps it has taken to improve on its CPRA compliance, and to reassure the public of its right of access to that agency's public records.

Consumer Affairs, Department of
400 "R" Street, Suite 3000
Sacramento, CA 95814-6200

Posted - Moved to: **Consumer Affairs, Department of**
1625 North Market Blvd.
Sacramento, CA 95834-1924

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1) Verbal Request – (a) to view the most recent FPPC Form 700 (Statement of Economic Interests) for this public agency's top-ranking employee;

(b) for a copy of this public agency's written guidelines for accessibility of public records.

Request made to: **Employee repeatedly refused to identify herself at Consumer Information Center, Consumer and Community Relations Division**

Guidelines: **Posted? NO** **Provided? NO**

Date: 1-19-06 **Time in: 12:15** **Time out: 12:50** **Elapsed time: 35 minutes**

X Asked Requester's Identity
X Asked Requester's Affiliation
X Required Use Of An Agency Form
X Asked Why Records Were Sought
Told Agency Had __ Days To Comply

Comments/Information:

The female employee I was dealing with in the Consumer Information Center repeatedly refused to identify herself. She asked my affiliation three times. She said one reason for not giving me her name was because I would not tell her what agency I was working for, even though I assured her that I worked for no agency.

A male employee then came up and handed me a "Procedure to Subpoena Records" form (attached) and told me I would need to call the phone number on that form. This male employee also refused to identify himself. Neither the female nor the male employee would accept either of my requests (verbal or written) and refused to date stamp them for me.

*****Made both CPRA requests by mail on 1-24-06.**

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2) Written Request for copies of –

a) the Employment Contract and/or similar document(s) that reflect the total annual compensation of this state agency's top-ranking employee; and

b) the most recent litigation settlement agreement involving this state agency, which includes a payment of $100,000 or more to the plaintiff(s).

Date Records Provided (or Notified Ready): Cost: $

Comments:

By 2-19-06 had received nothing.

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Attachment F

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BUSINESS AND PROFESSIONS CODE SECTION 800-809.9

800. (a) The Medical Board of California, the Board of Psychology, the Dental Board of California, the Osteopathic Medical Board of California, the State Board of Chiropractic Examiners, the Board of Registered Nursing, the Board of Vocational Nursing and Psychiatric Technicians, the State Board of Optometry, the Veterinary Medical Board, the Board of Behavioral Sciences, the Physical Therapy Board of California, and the California State Board of Pharmacy shall each separately create and maintain a central file of the names of all persons who hold a license, certificate, or similar authority from that board. Each central file shall be created and maintained to provide an individual historical record for each licensee with respect to the following information:

(1) Any conviction of a crime in this or any other state that constitutes unprofessional conduct pursuant to the reporting requirements of Section 803.

(2) Any judgment or settlement requiring the licensee or his or her insurer to pay any amount of damages in excess of three thousand dollars ($3,000) for any claim that injury or death was proximately caused by the licensee's negligence, error or omission in practice, or by rendering unauthorized professional services, pursuant to the reporting requirements of Section 801 or 802.

(3) Any public complaints for which provision is made pursuant to subdivision (b).

(4) Disciplinary information reported pursuant to Section 805.

(b) Each board shall prescribe and promulgate forms on which members of the public and other licensees or certificate holders may file written complaints to the board alleging any act of misconduct in, or connected with, the performance of professional services by the licensee.

If a board, or division thereof, a committee, or a panel has failed to act upon a complaint or report within five years, or has found that the complaint or report is without merit, the central file shall be purged of information relating to the complaint or report.

Notwithstanding this subdivision, the Board of Psychology, the Board of Behavioral Sciences, and the Respiratory Care Board of California shall maintain complaints or reports as long as each board deems necessary.

(c) The contents of any central file that are not public records under any other provision of law shall be confidential except that the licensee involved, or his or her counsel or representative, shall have the right to inspect and have copies made of his or her complete file except for the provision that may disclose the identity of an information source. For the purposes of this section, a board may protect an information source by providing a copy of the material with only those deletions necessary to protect the identity of the source or by providing a comprehensive summary of the substance of the material. Whichever method is used, the board shall ensure that full disclosure is made to the subject of any personal information that could reasonably in any way reflect or convey anything detrimental, disparaging, or threatening to a licensee's reputation, rights, benefits, privileges, or qualifications, or be used by a board to make a determination that would affect a licensee's rights, benefits, privileges, or qualifications. The information required to be disclosed pursuant to Section 803.1 shall not be considered among the contents of a central file for the purposes of

this subdivision.

The licensee may, but is not required to, submit any additional exculpatory or explanatory statement or other information that the board shall include in the central file.

Each board may permit any law enforcement or regulatory agency when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes to inspect and have copies made of that licensee's file, unless the disclosure is otherwise prohibited by law.

These disclosures shall effect no change in the confidential status of these records.

801. (a) Every insurer providing professional liability insurance to a person who holds a license, certificate, or similar authority from or under any agency mentioned in subdivision (a) of Section 800 (except as provided in subdivisions (b), (c), (d), and (e)) shall send a complete report to that agency as to any settlement or arbitration award over three thousand dollars ($3,000) of a claim or action for damages for death or personal injury caused by that person's negligence, error, or omission in practice, or by his or her rendering of unauthorized professional services. The report shall be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties thereto or within 30 days after service of the arbitration award on the parties.

(b) Every insurer providing professional liability insurance to a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) or the Osteopathic Initiative Act shall send a complete report to the Medical Board of California or the Osteopathic Medical Board of California, as appropriate, as to any settlement over thirty thousand dollars ($30,000); or arbitration award of any amount; or civil judgment of any amount, whether or not vacated by a settlement after entry of the judgment, that was not reversed on appeal; of a claim or action for damages for death or personal injury caused by that person's negligence, error, or omission in practice, or by his or her rendering of unauthorized professional services. A settlement over thirty thousand dollars ($30,000) shall also be reported if the settlement is based on the licensee's negligence, error, or omission in practice, or by the licensee's rendering of unauthorized professional services, and a party to the settlement is a corporation, medical group, partnership, or other corporate entity in which the licensee has an ownership interest or that employs or contracts with the licensee. The report shall be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties thereto, within 30 days after service of the arbitration award on the parties, or within 30 days after the date of entry of the civil judgment.

(c) Every insurer providing professional liability insurance to a person licensed pursuant to Chapter 13 (commencing with Section 4980) or Chapter 14 (commencing with Section 4990) shall send a complete report to the Board of Behavioral Science Examiners as to any settlement or arbitration award over ten thousand dollars ($10,000) of a claim or action for damages for death or personal injury caused by that person's negligence, error, or omission in practice, or by his or her rendering of unauthorized professional services. The report shall be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties thereto or within 30 days after service of the arbitration award on the parties.

(d) Every insurer providing professional liability insurance to a dentist licensed pursuant to Chapter 4 (commencing with Section 1600)

shall send a complete report to the Dental Board of California as to any settlement or arbitration award over ten thousand dollars ($10,000) of a claim or action for damages for death or personal injury caused by that person's negligence, error, or omission in practice, or rendering of unauthorized professional services. The report shall be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties thereto or within 30 days after service of the arbitration award on the parties.

(e) Every insurer providing liability insurance to a veterinarian licensed pursuant to Chapter 60 (commencing with Section 4825) shall send a complete report to the Veterinary Medical Board of any settlement or arbitration award over ten thousand dollars ($10,000) of a claim or action for damages for death or injury caused by that person's negligence, error, or omission in practice, or rendering of unauthorized professional service. The report shall be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties thereto or within 30 days after service of the arbitration award on the parties.

(f) The insurer shall notify the claimant, or if the claimant is represented by counsel, the insurer shall notify the claimant's attorney, that the report required by subdivision (a), (b), (c), or (d) has been sent to the agency. If the attorney has not received this notice within 45 days after the settlement was reduced to writing and signed by all of the parties, the arbitration award was served on the parties, or the date of entry of the civil judgment, the attorney shall make the report to the agency.

(g) Notwithstanding any other provision of law, no insurer shall enter into a settlement without the written consent of the insured, except that this prohibition shall not void any settlement entered into without that written consent. The requirement of written consent shall only be waived by both the insured and the insurer. This section shall only apply to a settlement on a policy of insurance executed or renewed on or after January 1, 1971.

801.1. (a) Every state or local governmental agency that self insures a person who holds a license, certificate or similar authority from or under any agency mentioned in subdivision (a) of Section 800 (except a person licensed pursuant to Chapter 3 (commencing with Section 1200) or Chapter 5 (commencing with Section 2000) of Division 2 or the Osteopathic Initiative Act) shall send a complete report to that agency as to any settlement or arbitration award over three thousand dollars ($3,000) of a claim or action for damages for death or personal injury caused by that person's negligence, error or omission in practice, or rendering of unauthorized professional services. The report shall be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties thereto or within 30 days after service of the arbitration award on the parties.

(b) Every state or local governmental agency that self-insures a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 or the Osteopathic Initiative Act shall send a complete report to the Medical Board of California or the Osteopathic Medical Board of California, as appropriate, as to any settlement or arbitration award over thirty thousand dollars ($30,000) of a claim or action for damages for death or personal injury caused by that person's negligence, error or omission in practice, or rendering of unauthorized professional services. A settlement over thirty thousand dollars ($30,000) shall also be reported if the settlement is based on the licensee's negligence,

error, or omission in practice or by his or her rendering of unauthorized professional services, and a party to the settlement is a corporation, medical group, partnership, or other corporate entity in which the licensee has an ownership interest or that employs or contracts with the licensee. The report shall be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties thereto or within 30 days after service of the arbitration award on the parties.

(c) Every state or local governmental agency that self-insures a person licensed pursuant to Chapter 13 (commencing with Section 4980) or Chapter 14 (commencing with Section 4990) shall send a complete report to the Board of Behavioral Science Examiners as to any settlement or arbitration award over ten thousand dollars ($10,000) of a claim or action for damages for death or personal injury caused by that person's negligence, error, or omission in practice, or rendering of unauthorized professional services. The report shall be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties thereto or within 30 days after service of the arbitration award on the parties.

802. (a) Every settlement, judgment, or arbitration award over three thousand dollars ($3,000) of a claim or action for damages for death or personal injury caused by negligence, error or omission in practice, or by the unauthorized rendering of professional services, by a person who holds a license, certificate, or other similar authority from an agency mentioned in subdivision (a) of Section 800 (except a person licensed pursuant to Chapter 3 (commencing with Section 1200) or Chapter 5 (commencing with Section 2000) of Division 2) or the Osteopathic Initiative Act who does not possess professional liability insurance as to that claim shall, within 30 days after the written settlement agreement has been reduced to writing and signed by all the parties thereto or 30 days after service of the judgment or arbitration award on the parties, be reported to the agency that issued the license, certificate, or similar authority. A complete report shall be made by appropriate means by the person or his or her counsel, with a copy of the communication to be sent to the claimant through his or her counsel if the person is so represented, or directly if he or she is not. If, within 45 days of the conclusion of the written settlement agreement or service of the judgment or arbitration award on the parties, counsel for the claimant (or if the claimant is not represented by counsel, the claimant himself or herself) has not received a copy of the report, he or she shall himself or herself make the complete report. Failure of the licensee or claimant (or, if represented by counsel, their counsel) to comply with this section is a public offense punishable by a fine of not less than fifty dollars ($50) or more than five hundred dollars ($500). Knowing and intentional failure to comply with this section or conspiracy or collusion not to comply with this section, or to hinder or impede any other person in the compliance, is a public offense punishable by a fine of not less than five thousand dollars ($5,000) nor more than fifty thousand dollars ($50,000).

(b) Every settlement over thirty thousand dollars ($30,000), or judgment or arbitration award of any amount, of a claim or action for damages for death or personal injury caused by negligence, error or omission in practice, or by the unauthorized rendering of professional services, by a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2, or the Osteopathic Initiative Act, who does not possess professional liability insurance as to the claim shall, within 30 days after the

written settlement agreement has been reduced to writing and signed by all the parties thereto or 30 days after service of the judgment or arbitration award on the parties, be reported to the agency that issued the license, certificate, or similar authority. A settlement over thirty thousand dollars ($30,000) shall also be reported if the settlement is based on the licensee's negligence, error, or omission in practice or his or her rendering of unauthorized professional services, and a party to the settlement is a corporation, medical group, partnership, or other corporate entity in which the licensee has an ownership interest or that employs or contracts with the licensee. A complete report including the name and license number of the physician and surgeon shall be made by appropriate means by the person or his or her counsel, with a copy of the communication to be sent to the claimant through his or her counsel if he or she is so represented, or directly if he or she is not. If, within 45 days of the conclusion of the written settlement agreement or service of the judgment or arbitration award on the parties, counsel for the claimant (or if the claimant is not represented by counsel, the claimant himself or herself) has not received a copy of the report, he or she shall himself or herself make the complete report. Failure of the physician and surgeon or claimant (or, if represented by counsel, their counsel) to comply with this section is a public offense punishable by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500). Knowing and intentional failure to comply with this section or conspiracy or collusion not to comply with this section, or to hinder or impede any other person in the compliance, is a public offense punishable by a fine of not less than five thousand dollars ($5,000) nor more than fifty thousand dollars ($50,000).

(c) Every settlement, judgment, or arbitration award over ten thousand dollars ($10,000) of a claim or action for damages for death or personal injury caused by negligence, error, or omission in practice, or by the unauthorized rendering of professional services, by a marriage and family therapist or clinical social worker licensed pursuant to Chapter 13 (commencing with Section 4980) or Chapter 14 (commencing with Section 4990) who does not possess professional liability insurance as to that claim shall within 30 days after the written settlement agreement has been reduced to writing and signed by all the parties thereto or 30 days after service of the judgment or arbitration award on the parties be reported to the agency that issued the license, certificate, or similar authority. A complete report shall be made by appropriate means by the person or his or her counsel, with a copy of the communication to be sent to the claimant through his or her counsel if he or she is so represented, or directly if he or she is not. If, within 45 days of the conclusion of the written settlement agreement or service of the judgment or arbitration award on the parties, counsel for the claimant (or if he or she is not represented by counsel, the claimant himself or herself) has not received a copy of the report, he or she shall himself or herself make a complete report. Failure of the marriage and family therapist or clinical social worker or claimant (or, if represented by counsel, their counsel) to comply with this section is a public offense punishable by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500). Knowing and intentional failure to comply with this section, or conspiracy or collusion not to comply with this section or to hinder or impede any other person in that compliance, is a public offense punishable by a fine of not less than five thousand dollars ($5,000) nor more than fifty thousand dollars ($50,000).

802.3. Every report of a settlement required by Sections 801, 801.1, and 802 shall specify the specialty or subspecialty of the physician and surgeon involved.

803. (a) (1) Except as provided in paragraph (2), within 10 days after a judgment by a court of this state that a person who holds a license, certificate, or other similar authority from the Board of Behavioral Science Examiners or from an agency mentioned in subdivision (a) of Section 800 (except a person licensed pursuant to Chapter 3 (commencing with Section 1200)) has committed a crime, or is liable for any death or personal injury resulting in a judgment for an amount in excess of thirty thousand dollars ($30,000) caused by his or her negligence, error or omission in practice, or his or her rendering unauthorized professional services, the clerk of the court that rendered the judgment shall report that fact to the agency that issued the license, certificate, or other similar authority.

(2) For purposes of a physician and surgeon who has committed a crime, or is liable for any death or personal injury resulting in a judgment of any amount caused by his or her negligence, error or omission in practice, or his or her rendering unauthorized professional services, the clerk of the court that rendered the judgment shall report that fact to the agency that issued the license.

(b) Every insurer providing professional liability insurance to a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) shall send a complete report including the name and license number of the physician and surgeon to the Medical Board of California or the Osteopathic Medical Board of California as to any judgment of a claim for damages for death or personal injury caused by that licensee's negligence, error, or omission in practice, or rendering of unauthorized professional services. The report shall be sent within 30 calendar days after entry of judgment.

(c) Notwithstanding any other provision of law, the Medical Board of California, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine shall disclose to an inquiring member of the public information received pursuant to subdivision (a) regarding felony convictions of, and judgments against, a physician and surgeon or doctor of podiatric medicine. The Division of Medical Quality, the Osteopathic Medical Board of California, and the California Board of Podiatric Medicine may formulate appropriate disclaimers or explanatory statements to be included with any information released, and may, by regulation, establish categories of information that need not be disclosed to the public because that information is unreliable or not sufficiently related to the licensee's professional practice.

803.3. Any arbitration under a health care service plan contract for any death or personal injury resulting in an award for an amount in excess of thirty thousand dollars ($30,000) shall be a judgment for purposes of subdivision (b) of Section 803.

803.5. (a) The district attorney, city attorney, or other prosecuting agency shall notify the Medical Board of California, the Osteopathic Medical Board of California, the California Board of Podiatric Medicine, the State Board of Chiropractic Examiners, or other appropriate allied health board, and the clerk of the court in which the charges have been filed, of any filings against a licensee of that board charging a felony immediately upon obtaining

information that the defendant is a licensee of the board. The notice shall identify the licensee and describe the crimes charged and the facts alleged. The prosecuting agency shall also notify the clerk of the court in which the action is pending that the defendant is a licensee, and the clerk shall record prominently in the file that the defendant holds a license from one of the boards described above.

(b) The clerk of the court in which a licensee of one of the boards is convicted of a crime shall, within 48 hours after the conviction, transmit a certified copy of the record of conviction to the applicable board. Where the licensee is regulated by an allied health board, the record of conviction shall be transmitted to that allied health board and the Medical Board of California.

803.6. (a) The clerk of the court shall transmit any felony preliminary hearing transcript concerning a defendant licensee to the Medical Board of California, the Osteopathic Medical Board of California, the California Board of Podiatric Medicine, or other appropriate allied health board, as applicable, where the total length of the transcript is under 800 pages and shall notify the appropriate board of any proceeding where the transcript exceeds that length.

(b) In any case where a probation report on a licensee is prepared for a court pursuant to Section 1203 of the Penal Code, a copy of that report shall be transmitted by the probation officer to the board.

804. (a) Any agency to whom reports are to be sent under Section 801, 801.1, 802, or 803, may develop a prescribed form for the making of the reports, usage of which it may, but need not, by regulation, require in all cases.

(b) A report required to be made by Sections 801, 801.1, or 802 shall be deemed complete only if it includes the following information: (1) the name and last known business and residential addresses of every plaintiff or claimant involved in the matter, whether or not each plaintiff or claimant recovered anything; (2) the name and last known business and residential addresses of every physician or provider of health care services who was claimed or alleged to have acted improperly, whether or not that person was a named defendant and whether or not any recovery or judgment was had against that person; (3) the name, address, and principal place of business of every insurer providing professional liability insurance as to any person named in (2), and the insured's policy number; (4) the name of the court in which the action or any part of the action was filed along with the date of filing and docket number of each action; (5) a brief description or summary of the facts upon which each claim, charge or judgment rested including the date of occurrence; (6) the names and last known business and residential addresses of every person who acted as counsel for any party in the litigation or negotiations, along with an identification of the party whom said person represented; (7) the date and amount of final judgment or settlement; and (8) any other information the agency to whom the reports are to be sent may, by regulation, require.

(c) Every person named in the report, who is notified by the board within 60 days of the filing of the report, shall maintain for the period of three years from the filing of the report any records he or she has as to the matter in question and shall make those available upon request to the agency with which the report was filed.

(d) Every professional liability insurer that makes a report under

Section 801, or self-insured governmental agency that makes a report pursuant to Section 801.1, and has received a copy of any written patient medical or hospital records prepared by the treating physician or the staff of the treating physician or hospital, describing the medical condition, history, care, or treatment of the person whose death or injury is the subject of the claim prompting the Section 801 or 801.1 report, or a copy of any depositions in the matter that discuss the care, treatment, or medical condition of the person, shall provide with the report copies of the records and depositions, subject to reasonable costs to be paid by the Medical Board of California to the insurer, except when confidentiality is required by court order. If confidentiality is required by court order and, as a result, the insurer is unable to provide the records and depositions, documentation to that effect shall accompany the original report. The applicable board may, upon prior notification of the parties to the action, petition the appropriate court for modification of any protective order to permit disclosure to the board. A professional liability insurer or self-insured governmental agency shall maintain the records and depositions referred to in this subdivision for at least one year from the date of the Section 801 or 801.1 report.

Attachment G

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Business and Professions Code

27. (a) Every entity specified in subdivision (b), on or after July 1, 2001, shall provide on the Internet information regarding the status of every license issued by that entity in accordance with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and the Information Practices Act of 1977 (Chapter 1 (commencing with Section 1798) of Title 1.8 of Part 4 of Division 3 of the Civil Code). The public information to be provided on the Internet shall include information on suspensions and revocations of licenses issued by the entity and other related enforcement action taken by the entity relative to persons, businesses, or facilities subject to licensure or regulation by the entity. In providing information on the Internet, each entity shall comply with the Department of Consumer Affairs Guidelines for Access to Public Records. The information may not include personal information, including home telephone number, date of birth, or social security number. Each entity shall disclose a licensee's address of record. However, each entity shall allow a licensee to provide a post office box number or other alternate address, instead of his or her home address, as the address of record. This section shall not preclude an entity from also requiring a licensee, who has provided a post office box number or other alternative mailing address as his or her address of record, to provide a physical business address or residence address only for the entity's internal administrative use and not for disclosure as the licensee's address of record or disclosure on the Internet.

(b) Each of the following entities within the Department of Consumer Affairs shall comply with the requirements of this section:

(1) The Acupuncture Board shall disclose information on its licensees.

(2) The Board of Behavioral Sciences shall disclose information on its licensees, including marriage and family therapists, licensed clinical social workers, and licensed educational psychologists.

(3) The Dental Board of California shall disclose information on its licensees.

(4) The State Board of Optometry shall disclose information regarding certificates of registration to practice optometry, statements of licensure, optometric corporation registrations, branch office licenses, and fictitious name permits of their licensees.

(5) The Board for Professional Engineers and Land Surveyors shall disclose information on its registrants and licensees.

(6) The Structural Pest Control Board shall disclose information on its licensees, including applicators, field representatives, and operators in the areas of fumigation, general pest and wood destroying pests and organisms, and wood roof cleaning and treatment.

(7) The Bureau of Automotive Repair shall disclose information on its licensees, including auto repair dealers, smog stations, lamp and brake stations, smog check technicians, and smog inspection certification stations.

(8) The Bureau of Electronic and Appliance Repair shall disclose information on its licensees, including major appliance repair dealers, combination dealers (electronic and appliance), electronic repair dealers, service contract sellers, and service contract administrators.

(9) The Cemetery Program shall disclose information on its licensees, including cemetery brokers, cemetery salespersons, crematories, and cremated remains disposers.

(10) The Funeral Directors and Embalmers Program shall disclose information on its licensees, including embalmers, funeral establishments, and funeral directors.

(11) The Contractors' State License Board shall disclose information on its licensees in accordance with Chapter 9 (commencing with Section 7000) of Division 3. In addition to information related to licenses as specified in subdivision (a), the board shall also disclose information provided to the board by the Labor Commissioner pursuant to Section 98.9 of the Labor Code.

(12) The Board of Psychology shall disclose information on its licensees, including psychologists, psychological assistants, and registered psychologists.

(c) "Internet" for the purposes of this section has the meaning set forth in paragraph (6) of subdivision (e) of Section 17538.

Attachment H

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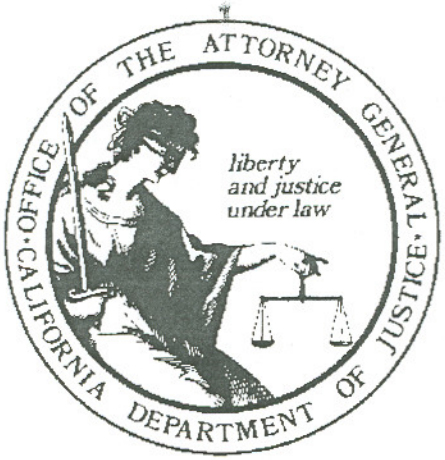

Summary of the California Public Records Act 2004

California Attorney General's Office

SUMMARY
CALIFORNIA PUBLIC RECORDS ACT
GOVERNMENT CODE SECTION[1] 6250 ET SEQ.
August, 2004

I

OVERVIEW

Legislation enacting the California Public Records Act (hereinafter, "CPRA") was signed in 1968, culminating a 15-year-long effort to create a general records law for California. Previously, one was required to look at the law governing the specific type of record in question in order to determine its disclosability. When the CPRA was enacted, an attempt was made to remove a number of these specific laws from the books. However, preexisting privileges such as the attorney-client privilege have been incorporated by reference into the provisions of the CPRA.

The fundamental precept of the CPRA is that governmental records shall be disclosed to the public, upon request, unless there is a specific reason not to do so. Most of the reasons for withholding disclosure of a record are set forth in specific exemptions contained in the CPRA. However, some confidentiality provisions are incorporated by reference to other laws. Also, the CPRA provides for a general balancing test by which an agency may withhold records from disclosure, if it can establish that the public interest in nondisclosure clearly outweighs the public interest in disclosure.

There are two recurring interests that justify most of the exemptions from disclosure. First, several CPRA exemptions are based on a recognition of the individual's right to privacy (e.g., privacy in certain personnel, medical or similar records). Second, a number of disclosure exemptions are based on the government's need to perform its assigned functions in a reasonably efficient manner (e.g., maintaining confidentiality of investigative records, official information, records related to pending litigation, and preliminary notes or memoranda).

If a record contains exempt information, the agency generally must segregate or redact the exempt information and disclose the remainder of the record. If an agency improperly withholds records, a member of the public may enforce, in court, his or her right to inspect or copy the records and receive payment for court costs and attorney's fees.

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1. All section references are to the Government Code unless otherwise indicated.

II

PUBLIC ACCESS v. RIGHTS OF PRIVACY

A. Right To Monitor Government

In enacting the CPRA, the Legislature stated that access to information concerning the conduct of the public's business is a fundamental and necessary right for every person in the State.[1] Cases interpreting the CPRA also have emphasized that its primary purpose is to give the public an opportunity to monitor the functioning of their government.[2] The greater and more unfettered the public official's power, the greater the public's interest in monitoring the governmental action.[3]

B. The Right Of Privacy

Privacy is a constitutional right and a fundamental interest recognized by the CPRA.[4] Although there is no general right to privacy articulated in the CPRA, the Legislature recognized the individual right to privacy in crafting a number of its exemptions. Thus, in administering the provisions of the CPRA, agencies must sometimes use the general balancing test to determine whether the right of privacy in a given circumstance outweighs the interests of the public in access to the information. If personal or intimate information is extracted from a person (e.g., a government employee or appointee, or an applicant for government employment/appointments a precondition for the employment or appointment), a privacy interest in such information is likely to be recognized.[5] However, if information is provided voluntarily in order to acquire a benefit, a privacy right is less likely to be recognized.[6] Sometimes, the question of disclosure depends upon whether the invasion of an individual's privacy is sufficiently invasive so as to outweigh the public interest in disclosure.

III

SCOPE OF COVERAGE

A. Public Record Defined

1. Identifiable Information

The public may inspect or obtain a copy of identifiable public records.[7] Writings held by state or local government are public records.[8] A writing includes all forms of recorded information that currently exist or that may exist in the future. [9] The essence of the CPRA is to provide access to information, not merely documents and files.[10] However, it is not enough to provide extracted information to the requestor, the document containing the information must be provided. In order to invoke the CPRA, the request for records must be both specific and focused. The requirement of clarity must be tempered by the reality that

a requester, having no access to agency files or their scheme of organization, may be unable to precisely identify the documents sought. Thus, writings may be described by their content.[11]

To the extent reasonable, agencies are generally required to assist members of the public in making focused and effective requests for identifiable records.[12] One legislatively-approved method of providing assistance is to make available an index of the agency's records.[13] A request for records may be made orally or in writing.[14] When an oral request is received, the agency may wish to consider confirming the request in writing in order to eliminate any confusion regarding the request.

2. Computer Information

When a person seeks a record in an electronic format, the agency shall, upon request, make the information available in any electronic format in which it holds the information.[15] Computer software developed by the government is exempt from disclosure.[16]

B. Agencies Covered

All state and local government agencies are covered by the CPRA.[17] Non-profit and for-profit entities subject to the Ralph M. Brown Act are covered as well.[18] The CPRA is not applicable to the Legislature, which is instead covered by the Legislative Open Records Act.[19] The judicial branch is not bound by the CPRA, although most court records are disclosable as a matter of public rights of access to courts.[20] Federal government agencies are covered by the Federal Freedom of Information Act.[21]

C. Member Of The Public

The CPRA entitles natural persons and business entities as members of the public to inspect public records in the possession of government agencies.[22] Persons who have filed claims or litigation against the government, or who are investigating the possibility of so doing, generally retain their identity as members of the public.[23] Representatives of the news media have no greater rights than members of the public.[24] Government employees acting in their official capacity are not considered to be members of the public.[25] Individuals may have greater access to records about themselves than public records, generally. [26]

D. Right To Inspect And Copy Public Records

Records may be inspected at an agency during its regular office hours.[27] The CPRA contains no provision for a charge to be imposed in connection with the mere inspection of records. Copies of records may be obtained for the direct cost of duplication, unless the Legislature has established a statutory fee.[28] The direct cost of duplication includes the pro rata expense of the duplicating equipment utilized in making a copy of a record and, conceivably, the pro rata expense in terms of staff time (salary/benefits) required to produce the copy. [29] A staff

person's time in researching, retrieving and mailing the record is not included in the direct cost of duplication. By contrast, when an agency must compile records or extract information from an electronic record or undertake programming to satisfy a request, the requestor must bear the full cost, not merely the direct cost of duplication.[30] The right to inspect and copy records does not extend to records that are exempt from disclosure.

IV

REQUEST FOR RECORDS AND AGENCY RESPONSE

A. Procedures

A person need not give notice in order to inspect public records at an agency's offices during normal working hours. However, if the records are not readily accessible or if portions of the records must be redacted in order to protect exempt material, the agency must be given a reasonable period of time to perform these functions.

When a copy of a record is requested, the agency shall determine within ten days whether to comply with the request, and shall promptly inform the requester of its decision and the reasons therefor.[31] Where necessary, because either the records or the personnel that need to be consulted regarding the records are not readily available, the initial ten-day period to make a determination may be extended for up to fourteen days.[32] If possible, records deemed subject to disclosure should be provided at the time the determination is made. If immediate disclosure is not possible, the agency must provide the records within a reasonable period of time, along with an estimate of the date that the records will be available. The Public Records Act does not permit an agency to delay or obstruct the inspection or copying of public records.[33] Finally, when a written request is denied, it must be denied in writing. [34]

B. Claim Of Exemption

Under specified circumstances, the CPRA affords agencies a variety of discretionary exemptions which they may utilize as a basis for withholding records from disclosure. These exemptions generally include personnel records, investigative records, drafts, and material made confidential by other state or federal statutes. In addition, a record may be withheld whenever the public interest in nondisclosure clearly outweighs the public interest in disclosure. When an agency withholds a record because it is exempt from disclosure, the agency must notify the requester of the reasons for withholding the record. However, the agency is not required to provide a list identifying each record withheld and the specific justification for withholding the record.[35]

C. Segregation Of Exempt From Nonexempt Material

When a record contains exempt material, it does not necessarily mean that the entire record may be withheld from disclosure. Rather, the general rule is that the exempt material may be withheld but the remainder of the record must be disclosed.[36] The fact that it is time consuming to segregate exempt material does not obviate the requirement to do it, unless the burden is so onerous as to clearly outweigh the public interest in disclosure.[37] If the information which would remain after exempt material has been redacted would be of little or no value to the requester, the agency may refuse to disclose the record on the grounds that the segregation process is unduly burdensome.[38] The difficulty in segregating exempt from nonexempt information is relevant in determining the amount of time which is reasonable for producing the records in question.

D. Waiver Of Exemption

Exempt material must not be disclosed to any member of the public if the material is to remain exempt from disclosure.[39] Once material has been disclosed to a member of the public, it generally is available upon request to any and all members of the public. Confidential disclosures to another governmental agency in connection with the performance of its official duties, or disclosures in a legal proceeding are not disclosures to members of the public under the CPRA and do not constitute a waiver of exempt material.[40]

V

EXEMPTION FOR PERSONNEL, MEDICAL OR SIMILAR RECORDS
(Gov. Code, § 6254(c))

A. Records Covered

A personnel, medical or similar record generally refers to intimate or personal information which an individual is required to provide to a government agency frequently in connection with employment.[41] The fact that information is in a personnel file does not necessarily make it exempt information.[42] Information such as an individual's qualifications, training, or employment background, which are generally public in nature, ordinarily are not exempt.[43]

Information submitted by license applicants is not covered by section 6254(c) but is protected under section 6254(n) and, under special circumstances, may be withheld under the balancing test in section 6255.[44]

B. Disclosure Would Constitute An Unwarranted Invasion Of Privacy

If information is intimate or personal in nature and has not been provided to a government agency as part of an attempt to acquire a benefit, disclosure of the information probably would constitute a violation of the individual's privacy. However, the invasion of an individual's privacy must be balanced against the public's need for the information. Only where the invasion of privacy is unwarranted as compared to the public interest in the information does the exemption permit the agency to withhold the record from disclosure. If this balancing test indicates that the privacy interest outweighs the public interest in disclosure, disclosure of the record by the government would appear to constitute an unwarranted invasion of privacy.

Courts have reached different conclusions regarding whether the investigation or audit of a public employee's performance is disclosable.[45] The gross salary and benefits of high-level state and local officials are a matter of public record. However, a recent case indicated that absent a showing that the name of a particular civil service employee is important in monitoring government performance, civil service employees have an expectation of privacy in individually identifiable salary information.[46]

VI

EXEMPTION FOR PRELIMINARY NOTES, DRAFTS AND MEMORANDA
(Gov. Code, § 6254(a))

Under this exemption, materials must be (1) notes, drafts or memoranda (2) which are not retained in the ordinary course of business (3) where the public interest in nondisclosure clearly outweighs the public interest in disclosure. This exemption has little or no effect since the deliberative process privilege was clearly established under the balancing test in section 6255 in 1991, but is mentioned here because it is in the Act.[47]

VII

EXEMPTION FOR INVESTIGATIVE RECORDS AND INTELLIGENCE INFORMATION
(Gov. Code, § 6254(f))

A. Investigative Records

Records of complaints, preliminary inquiries to determine if a crime has been committed, and full-scale investigations, as well as closure memoranda are investigative records.[48] In addition, records that are not inherently investigatory may be covered by the exemption where they pertain to an enforcement proceeding that has become concrete and definite.[49]

Investigative and security records created for law enforcement, correctional or licensing purposes also are covered by the exemption from disclosure. The term "law enforcement" agency refers to traditional criminal law enforcement agencies.[50] Records created in connection with administrative investigations unrelated to licensing are not subject to the exemption. The exemption is permanent and does not terminate once the investigation has been completed.[51]

Even though investigative records themselves may be withheld, section 6254(f) mandates that law enforcement agencies disclose specified information about investigative activities.[52] However, the agency's duty to disclose information pursuant to section 6254(f) only applies if the request is made contemporaneously with the creation of the record in which the requested information is contained.[53] This framework is fundamentally different from the approach followed by other exemptions in the Public Records Act and in federal law, in which the records themselves are disclosable once confidential information has been redacted.

Specifically, section 6254(f) requires that basic information must be disclosed by law enforcement agencies in connection with calls for assistance or arrests, unless to do so would endanger the safety of an individual or interfere with an investigation.[54] With respect to public disclosures concerning calls for assistance and the identification of arrestees, the law restricts disclosure of address information to specified persons.[55] However, section 6254(f) expressly permits agencies to withhold the analysis and conclusions of investigative personnel. Thus, specified facts may be disclosable pursuant to the statutory directive, but the analysis and recommendations of investigative personnel concerning such facts are exempt.

B. Intelligence Information

Records of intelligence information collected by the Attorney General and state and local police agencies are exempt from disclosure. Intelligence information is related to criminal activity but is not focused on a concrete prospect of enforcement.

VIII

EXEMPTIONS FOR LITIGATION AND ATTORNEY RECORDS
(Gov. Code, § 6254 (b), (k))

A. Pending Claims And Litigation

Section 6254(b) permits documents specifically prepared in connection with filed litigation to be withheld from disclosure.[56] The exemption has been interpreted to apply only to documents created after the commencement of the litigation.[57] For example, it does not apply to the claim that initiates the administrative or court process. Once litigation is

resolved, this exemption no longer protects records from disclosure, although other exemptions (e.g., attorney-client privilege) may be ongoing.[58]

Nonexempt records pertaining to the litigation are disclosable to requestors, including prospective or actual parties to the litigation.[59] Generally, a request from actual or prospective litigants can be barred only where an independent statutory prohibition or collateral estoppel applies. If the agency believes that providing the record would violate a discovery order, it should bring the matter to the attention of the court that issued the order.[60]

In discovery during civil litigation unrelated to the Public Records Act, Evidence Code section 1040 (as opposed to the Act's exemptions) governs.[61]

B. Attorney-Client Privilege

The attorney-client privilege covers confidential communications between an attorney and his or her client. The privilege applies to litigation and nonlitigation situations.[62] The privilege appears in section 954 of the Evidence Code and is incorporated into the CPRA through section 6254(k). The privilege lasts forever unless waived. However, the privilege is not waived when a confidential communication is provided to an opposing party where to do so is reasonably necessary to assist the parties in finalizing their negotiations.[63]

C. Attorney Work Product

The attorney work product rule covers research, analysis, impressions and conclusions of an attorney. This confidentiality rule appears in section 2018 of the Code of Civil Procedure and is incorporated into the CPRA through section 6254(k). Records subject to the rule are confidential forever. The rule applies in litigation and nonlitigation circumstances alike.[64]

IX

OTHER EXEMPTIONS

A. Official Information

Information gathered by a government agency under assurances of confidentiality may be withheld if it is in the public interest to do so. The official information privilege appears in Evidence Code section 1040 and is incorporated into the CPRA through section 6254(k). The analysis and balancing of competing interests in withholding versus disclosure is the same under Evidence Code section 1040 as it is under section 6255.[65] When an agency is in litigation, it may not resist discovery by asserting exemptions under the CPRA; rather, it must rely on the official information privilege.[66]

B. Trade Secrets

Agencies may withhold confidential trade secret information pursuant to Evidence Code section 1060 which is incorporated into the CPRA through section 6254(k). However, with respect to state contracts, bids and their resulting contracts generally are disclosable after bids have been opened or the contracts awarded.[67] Although the agency has the obligation to initially determine when records are exempt as trade secrets, a person or entity disclosing trade secret information to an agency may be required to assist in the identification of the information to be protected and may be required to litigate any claim of trade secret which exceeds that which the agency has asserted.

C. Other Express Exemptions

Other express exemptions include records relating to: securities and financial institutions;[68] utility, market and crop reports;[69] testing information;[70] appraisals and feasibility reports;[71] gubernatorial correspondence;[72] legislative counsel records;[73] personal financial data used to establish a license applicant's personal qualifications;[74] home addresses;[75] and election petitions.[76]

The exemptions for testing information and personal financial data are of particular interest to licensing boards which must determine the competence and character of applicants in order to protect the public welfare.

X

THE PUBLIC INTEREST EXEMPTION
(Gov. Code, § 6255)

A. The Deliberative Process Privilege

The deliberative process privilege is intended to afford a measure of privacy to decision makers. This doctrine permits decision makers to receive recommendatory information from and engage in general discussions with their advisors without the fear of publicity. As a general rule, the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made.[77] Records which reflect a final decision and the reasoning which supports that decision are not covered by the deliberative process privilege. If a record contains both factual and deliberative materials, the deliberative materials may be redacted and the remainder of the record must be disclosed, unless the factual material is inextricably intertwined with the deliberative material. Under section 6255, a balancing test is applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question.[78]

B. Other Applications Of The Public Interest Exemption

In order to withhold a record under section 6255, an agency must demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. A particular agency's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the agency's that is weighed. This "public interest balancing test" has been the subject of several court decisions.

In a case involving the licensing of concealed weapons, the permits and applications were found to be disclosable in order for the public to properly monitor the government's administration of concealed weapons permits.[79] The court carved out a narrow exemption where disclosure would render an individual vulnerable to attack at a specific time and place. The court also permitted withholding of psychiatric information on privacy grounds.

In another case, a city sought to maintain the confidentiality of names and addresses of water users who violated the city's water rationing program. The court concluded that the public's interest in disclosure outweighed the public's interest in nondisclosure since disclosure would assist in enforcing the water rationing program.[80] The court rejected arguments that the water users' interests in privacy and maintaining freedom from intimidation justified nondisclosure.

The names, addresses, and telephone numbers of persons who have filed noise complaints concerning the operation of a city airport are protected from disclosure where under the particular facts involved, the court found that there were less burdensome alternatives available to serve the public interest.[81]

In a case involving a request for the names of persons who, as a result of gifts to a public university, had obtained licenses for the use of seats at an athletic arena, and the terms of those licenses, the court found that the university failed to establish its claim of confidentiality by a "clear overbalance." The court found the university's claims that disclosure would chill donations to be unsubstantiated. It further found a substantial public interest in such disclosure to permit public monitoring and avoid favoritism or discrimination in the operation of the arena.[82]

XI

LITIGATION UNDER THE ACT

A requester, but not a public agency, may bring an action seeking mandamus, injunctive relief or declaratory relief under sections 6258 or 6259.[83] To assist the court in making a decision, the documents in question may be inspected at an in-camera hearing (i.e. a private hearing with a judge). An in-camera hearing is held at the court's discretion, and the parties have no right to such a hearing. Prevailing plaintiffs shall be awarded court costs and attorney's fees. A plaintiff need not obtain all of the requested records in order to be the prevailing party in litigation.[84] A plaintiff is also considered the prevailing party if the lawsuit ultimately motivated the agency to provide the requested records.[85] Prevailing defendants may be awarded court costs and attorney fees only if the requestor's claim is clearly frivolous. There is no right of appeal, but the losing party may bring a petition for extraordinary relief to the court of appeal.

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If you wish to obtain additional copies of this pamphlet, they may be ordered or downloaded via the Attorney General's Home Page, located on the World Wide Web at http://caag.state.ca.us. You may also write to the Attorney General's Office, Public Inquiry Unit, P.O. Box 944255, Sacramento, CA 94244-2550 or call us at (800) 952-5225 (for callers within California), or (916) 322-3360 (for callers outside of California); the TTY/TDD telephone numbers are (800) 952-5548 (for callers within California), or (916) 324-5564 (for callers outside of California).

Deputy Attorney General Ted Prim, Editor
Special thanks to Neil Gould, Senior Staff Counsel, Department of Water Resources, for his assistance.

Attachment I

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February 3, 2006

CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS
1625 North Market Blvd.
Sacramento, CA 95834
(800) 952-5210 (916) 445-1254

Dear Department of Consumer Affairs:

Kindly forward this request for a Public Information policy change (below) to the appropriate individual(s) and/or board(s) for review and consideration as soon as possible.

I request that the DCA amend the following public information disclosure policy of the California Board of Behavioral Sciences following policy clause:
. " Malpractice judgments of more than $30,000 reported to the Board on or after July 1, 1995.",
and broaden the scope to include “judgements, arbitration awards, and mediation awards”.

I recently requested this information from the BBS, and received a reply that there has not been even one qualifying malpractice judgement of more than $30,000 reported to the BBS since the enactment of this public disclosure policy clause on July 1, 1995 -- 11 years ago. I was told that "judgement" means a monetary award specifically ordered by a court, and therefore the clause does not apply to or include mediation awards and/or arbitration awards.

This policy was enacted in 1995, under the intent to make information available to the public, but the policy is ineffective. It has not resulted in the release of any information to the public since it's enactment 11 years ago.

The public has a right and need to know about mediation awards and arbitration awards. (It can be noted that there is no implied guilt in the cases of arbitration and mediation awards, simply that the therapist has chosen to settle through arbitration or mediation rather than proceeding to trial where a judgement could occur.)

The need for disclosure is particularly important for the following reasons:

1) Only an extremely small percentage of psychological malpractice cases ever make it to trial. The overwhelming majority of malpractice claims against MFT’s, LCWS’s, and Psychologists are settled either through arbitration or mediation.

2) Of the thousands of complaints filed to the BBS since 1995, not even one resulted in a qualifying court judgement to be reported. However, many (including mine) resulted in arbitration awards and/or mediation awards of the same or greater dollar amount.

3) Additionally, because of the unique nature of privacy in the therapeutic relationship, it precludes the ability to "check references", like one can check references for anyone/anything else important (such as a doctor surgeon, attorney, child care provider, dentist, and so forth). Disclosure of mediation and arbitration awards thus assume an added importance for this reason.

4) The Medical Board of California policy publicly discloses information on judgements, *and* arbitration awards, *and* mediation awards. If the Medical Board deems this information important enough for public disclosure, the same rules should apply for disclosure by the Board of Behavioral Science and the Board of Psychology.

Disclosure of this information will inform and help protect the public, by informing the public that a therapist was engaged in a malpractice lawsuit that resulted in one of the following: a completed malpractice lawsuit trial which resulted in a judgement, or in mediation or arbitration award which resulted prior to proceeding to trial for potential judgement.

I sued a former therapist for malpractice. I received a settlement in excess of $30,000 in 2005, which was reported to the BBS. I also filed a complaint against the therapist after the lawsuit was resolved, and the BBS investigation is underway. Had my former therapist had any record of a judgement or settlement, that might have raised enough concern in me to either never begin seeing her, or certainly to leave what became an extremely damaging relationship with her sooner than I did.

I request the BBS public disclosure policy be amended. Also, I am currently seeking information about the policy within the Board of Psychology, but recommend it also contain the same provisions. I am willing to help, to enlist legal and/or legislative help, or whatever is necessary, to bring about an amendment of this policy, because I know firsthand, the importance of public disclosure of this information. I am available and willing to help. I will also continue researching the public information disclosure policy of other significant organizations at both the state and federal level.

I would appreciate a reply after your review. Thank you very much.

Sincerely,

Barbara J Murphy
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Agoura Hills, CA 91301
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